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Supreme Court, U.S.
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No. 96-927

In the Supreme Court of the United States

OCTOBER TERM, 1996

VISITING NURSE ASSOCIATION OF NORTH SHORE, INC., *et al.*,
petitioners,

v.

BRUCE M. BULLEN, *et al.*,
respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE FIRST QUESTION PRESENTED BY THE PETITION IS APPROPRIATELY RAISED IN THIS CASE

In their Brief in Opposition to the Petition for Certiorari (herein "Brief In Opposition"), respondents state that they are "tempted to agree with some of petitioners' broad philosophical points" about the potential for misuse of this Court's decision in *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). Brief In Opposition, page 8. Respondents, nevertheless, assert at page 8 of their Brief In Opposition that the first question presented by the petition — *i.e.*, whether the Court of Appeals properly relied on *Chevron* in deferring to a purported construction of the federal Medicaid statute and regulations by HCFA which the agency neither explicitly made, articulated or explained — is not appropriately raised in this case because petitioners could have brought an action against HCFA directly under the federal Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and obtained an explanation from HCFA for its action in this case, rather than proceed against the respondents under 42 U.S.C. § 1983.

Respondents, however, have independent obligations under the Medicaid statute and regulations which are enforceable in an action under 42 U.S.C. § 1983. *See Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990). HCFA became involved in these proceedings only because the Court of Appeals (but not the District Court) relied on a single unexplained action of HCFA's Regional Administrator as a basis of resolving *all* of petitioners' claims, not only with respect to respondent's implementation of the class rates on January 1, 1994 and again on November 1, 1994, but also with respect to their earlier implementation of the interim and phase-in rates. It is this extraordinary reliance by the Court of Appeals on a single, unexplained action of a Regional Administrator of HCFA that petitioners are asking this Court to review. Such a request for review is plainly appropriate under the circumstances of this case. *See generally Skidmore* v. *Swift & Co.*, 323 U.S. 134

(1945) (setting forth guidelines for weight to be given to prior rulings, interpretations and opinions of Wage and Hour Administrator in private suit under federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*).

Moreover, as petitioners pointed out in their petition (at p. 13 n. 3), the Regional Administrator of HCFA did not take the action on which the Court of Appeals relied in this case until more than *fifteen* months after the litigation was commenced, and the District Court had already ruled that the class rates were invalid. It appears, in fact, that the Regional Administrator took this action solely in response to the District Court's decision since, prior to that time, he had done essentially nothing.[1] Under the circumstances, an action against HCFA under the APA was not even practical, much less required.

Respondents further assert at pages 9-11 of their Brief In Opposition that the Court of Appeals was correct in deferring to HCFA's assumed construction of the Medicaid statute and regulations in this case, particularly since respondents themselves had reasonably relied on this assumed construction which was purportedly reflected in HCFA's earlier approval of the phrase "fixed negotiated fee schedules" as adequately describing the state's pre-1991 cost-based reimbursement system. In the first place, as petitioners pointed out in their petition (at p. 12), HCFA made no explicit finding that the words "fixed negotiated fee schedules" had been adequate to describe the state's pre-1991 cost-based system. Any reliance by respondents on this purported "finding" was therefore unreasonable. More importantly, it is axiomatic that a federal court cannot adopt or perpetuate an erroneous construction of a federal statute or regulations merely because a state offi-

[1] The Regional Administration requested further information with respect to SPA No. 94-003 in June, 1994, but respondents made no response to this request until April, 1995, well after the District Court had entered its decision that respondents' implementation of the class rates as of January 1, 1994, had been invalid. Two or three days later, the Regional Administrator approved SPA No. 94-003 retroactive until January 1, 1994.

cial or some other entity may have been relying on such an erroneous construction. Any such result would give an administrative agency such as HCFA the power to change or eradicate a statute or regulations merely by misconstruing them. This cannot be the law. *See, e.g., Garcia* v. *San Antonio Metro Transit Authority*, 469 U.S. 528 (1985) (overruling Court's own prior decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) with respect to applicability of Fair Labor Standards Act to municipal entities, notwithstanding possible reliance on such prior decision by numerous such entities).

Respondents next assert at page 11 of their Brief In Opposition that "the rates are indisputably valid today, after HCFA's approval of the extensive plan amendment filed in the fall of 1994, which the plaintiffs do not challenge in this Court," and, hence, in essence, petitioners are seeking purely retroactive relief, which is barred by the Eleventh Amendment to the United States Constitution. In fact, contrary to respondents' assertions, petitioners have been consistently challenging the adequacy of the state plan amendment filed in the fall of 1994 — SPA No. 94-023 — and respondents' accompanying implementation of the class rates as of November 1, 1994, as well as respondents' earlier implementation of the class rates on January 1, 1994. Once again, the Court of Appeals decided *both* of these questions solely by relying on HCFA's approval of SPA No. 94-003 retroactive to January 1, 1994. The Court of Appeals reasoned that, since HCFA had implicitly determined that SPA No. 94-003 was in approvable form at the time it was first submitted, SPA No. 94-023 was *necessarily* in approvable form at the time it was subsequently submitted in November, 1994, since SPA No. 94-023 went somewhat beyond SPA No. 94-003 in describing the methods and procedures that had been used to derive the class rates. Since petitioners are seeking review in this Court of the basic premise of the Court of Appeals' whole decision — *i.e.*, that SPA No. 94-003 was in approvable form at the time it was first submitted — they are necessarily

attacking the Court of Appeals' disposition of their claims with respect to the November 1, 1994, implementation of the class rates as well. The Eleventh Amendment therefore provides no bar to this proceeding. *E.g.*, *Edelman* v. *Jordon*, 415 U.S. 651, 666-68 (1974) (Eleventh Amendment permits suits against state officials in federal court for prospective, as opposed to retroactive relief); *see also Mason Gen. Hospital* v. *Secretary*, 809 F.2d 1220, 1223 (6th Cir. 1987) (effect of declaration that reimbursement rate is invalid is to restore previously effective rate, unless that rate is also invalid).

Respondents finally assert that the first question presented by the petition is not appropriately raised in this case since the Court of Appeals remanded petitioners' additional substantive claims to the District court for further proceedings. It is well-settled, however, that the jurisdiction of this Court on certiorari is plenary in nature, and does not depend on the judgment in the lower court being final. 28 U.S.C. § 1254(1); *Forsyth* v. *Hammond*, 166 U.S. 506, 511-13 (1897) (certiorari power "is not affected by the condition of the case as it exists in the Court of Appeals."). Any pursuit by petitioners of the remaining substantive claims in this case would in fact be futile in light of the Court of Appeals disposition of the procedural claims, and the deference the Court has mandated to HCFA's apparent approval of the class rates. The technical existence of these remaining substantive claims, therefore, provides no substantial basis for this Court to deny certiorari. *See, e.g.*, *Beacon Theatres, Inc.* v. *Westover*, 354 U.S. 500 (1959) (reviewing by certiorari decision of lower court requiring a case to proceed in equity rather than before a jury); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* §§ 2.2 and 4.18 (7th ed. 1993) (citing additional cases).

II. THE COURT OF APPEALS' DECISION WITH RESPECT TO THE CLASS RATES RAISES IMPORTANT ISSUES WHICH THIS COURT SHOULD DECIDE

A. *The Required Procedures For Adopting Reimbursement Rates For Noninstitutional Providers Are Identical To The Required Procedures For Adopting Reimbursement Rates For Institutional Providers*

Respondents do not even contend in their Brief In Opposition that the state plan amendment and public notice they promulgated at the time they implemented the class rates on January 1, 1994 included a sufficient description of the methods and procedures the state had used to derive such rates to permit *any* meaningful review or comment by HCFA or by any other interested party. Nevertheless, respondents assert at page 12 of their Brief In Opposition that the several court decisions petitioners have cited requiring at least some such description are all distinguishable, and therefore do not show a conflict among the circuits, since they all involved institutional, rather than noninstitutional, providers.

It is true, as respondents state in their Brief In Opposition, that reimbursement rates for institutional providers, such as hospitals and nursing homes, are governed by 42 U.S.C. § 1396a(a)(13), commonly referred to as the Boren Amendment, while reimbursement rates for noninstitutional providers, such as petitioners, are governed by 42 U.S.C. § 1396a(a)(30), commonly referred to as the Equal Access Provision. Contrary to respondents' assertions, however, the pertinent language of these provisions is essentially the same. *Compare* 42 U.S.C. § 1396a(a)(13)(A) (state plan for medical assistance must "provide for payment ... of the hospital services ... through the use of rates ... which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate ....") *with* 42 U.S.C. § 1396a(a)(30) (state plan for medical assistance must "provide such methods and procedures relating to ... the payment

for . . . services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care . . . ."); *Arkansas Medical Society, Inc.* v. *Reynolds*, 6 F.3d 519 (8th Cir. 1993) (language of Equal Access Provision is substantially identical to language of Boren Amendment applicable to reimbursement rates for institutional providers). More importantly, HCFA has adopted a common set of procedural regulations to implement *both* of these statutory provisions. Thus, each of the court decisions cited by petitioners involved precisely the same regulations that are at issue in this case, and there is no proper basis for distinguishing these cases. See, *e.g.*, *Homes for Aging Ass'n* v. *Indiana Office of Medicaid Policy and Planning*, 60 F.3d 262, 269 (7th Cir. 1995) (under 42 C.F.R. § 447.252(b), failure to "specify comprehensively" reimbursement methods and standards renders state plan invalid); *State* v. *Shalala*, 42 F.3d 595 (10th Cir. 1994) (same).

Nor is there any basis for respondents to assert, as they do at page 13 of their Brief In Opposition, that HCFA itself has been regularly drawing a distinction between the level of specificity required in a state plan amendment pertaining to the reimbursement of institutional providers, and the level of specificity required in a state plan amendment pertaining to the reimbursement of noninstitutional providers. The only authority respondents cite in support of this proposition is, once again, HCFA's alleged approval in this case of the phrase "fixed negotiated fee schedules" as adequately describing the state's pre-1991 reimbursement system, a system which in fact was based not on negotiation, but on prior year costs. Once again, the Regional Administrator of HCFA may have been misled in giving, or in failing to withhold, this prior approval and, in any event, it hardly shows a consistent practice on HCFA's part of distinguishing between state plan amendments pertaining to reimbursement rates for noninstitutional providers, and state plan amendments pertaining to reimbursement rates for institutional providers. Any such distinction would make no sense since, once again, the same

procedural regulations are applicable.

B. *Petitioners Properly Raised Respondents' Failure To Consult With A Medical Care Advisory Committee Prior To Implementing The Class Rates*

Promptly after the District Court announced its initial decision in this case in August, 1994, but before it had entered any judgment, petitioners filed an amended complaint in which they alleged that, in addition to their other procedural defaults, respondents had also failed to consult with a properly constituted Medical Care Advisory Committee ("MCAC") prior to implementing the class rates on January 1, 1994. Respondents thereafter filed an amended answer in which they essentially admitted that this was true, and then they in fact convened such a committee and conducted a perfunctory consultation with it prior to again implementing the class rates on November 1, 1994.

Notwithstanding their prior admission, respondents assert at page 15 of their Brief In Opposition that they have somehow been deprived of an opportunity to be heard on the matter of their failure to consult with a MCAC prior to implementing the class rates. This assertion ignores the fact that the matter was fully presented and briefed to the District Court as a separate basis for invalidating the prior interim and phase-in rates,[2] and then in the Court of Appeals as a separate basis for affirming the District Court's judgment with respect to the January, 1994 implementation of the class rates. Respondents were in no sense denied a full opportunity to be heard on the matter.

Nor is there any basis for respondents to assert, as they do at page 16 of this Brief In Opposition, that any failure on their

[2] Once the Court had held that the class rates were invalid, it was required to proceed to consider the validity of the earlier interim and phase-in rates, in order to determine whether either of those rates, or the earlier cost-based system, should be reinstated pending respondents' efforts to reimplement the class rates. *See. e.g., Mason Gen. Hospital* v. *Secretary, supra,* 809 F.2d at 1223 (6th Cir. 1987).

part to consult with a MCAC prior to implementing the class rates on January 1, 1994, was in any event harmless. It is one thing to consult with a MCAC prior to taking an action or changing a policy. It is quite another to consult with a MCAC several months after a policy has already been implemented, and an entity is trying to avoid a finding of liability. See *Morabito* v. *Blum*, 528 F. Supp. 252, 264 (S.D.N.Y. 1981) ("[T]he only way that a medical care advisory committee can be given the 'meaningful participation' that is required by 42 C.F.R. § 431.12(e) is to consult with them *prior to* the action in question."). The subsequent consultation could not render the earlier failure to consult with a MCAC harmless, at least with respect to respondents' initial implementation of the class rates on January 1, 1994. Cf. *NLRB* v. *Katz*, 369 U.S. 736 (1962) (employer's unilateral changes in sick-leave benefits plainly frustrated statutory objectives of National Labor Relations Act of establishing working conditions through collective bargaining and constituted violation of § 8(a)(5) of the Act).[3]

III. THE COURT OF APPEALS' DECISION WITH RESPECT TO THE PRIOR INTERIM AND PHASE-IN RATES ALSO RAISES IMPORTANT ISSUES WHICH THIS COURT SHOULD DECIDE

HCFA made no determination at all that, at the time respondents implemented the interim and phase-in rates, they were not required to file any new state plan amendment, or publish any new public notice. Nevertheless, respondents assert at pages 17-18 of their Brief In Opposition that this Court should deny review of the Court of Appeals' decision that no such new state plan amendment or new public notice was required because "HCFA and the Commonwealth flex-

[3] Respondents' suggestion at page 16 of their Brief In Opposition that petitioners somehow caused the MCAC violation by not raising the issue sooner overlooks the facts that respondents clearly have an independent obligation to be aware of, and comply with, the Medicaid statute and regulations. Petitioners in fact have been vigorously contesting respondents' implementation of the class rates in January, 1994 from the start of such implementation.

ibly defined the approved 'methods and procedures' from at least 1974 to 1994 as a 'fixed negotiated fee schedule'", and [p]laintiffs did not challenge the pre-1994 HCFA approval of these plans."

This assertion makes no sense. Once again, there is nothing in the record to suggest that HCFA approved respondents' implementation of the interim or phase-in rates without submitting a new plan amendment or publishing a new public notice. Indeed, there is nothing in the record to suggest that HCFA even knew about these changes.

Nor is there any basis for respondents to suggest, as they do at page 18 of their Brief In Opposition, that a "comparison of the pre-1991 rates with the subsequent interim and phase-in rates demonstrates no change in 'methods and procedures' embodied in the concept of a 'fixed negotiated fee schedule.'" The interim and phase-in rates in fact imposed significant mandatory rate limitations which were *not* included in the pre-1991 cost-based system. Respondents themselves recognized the significance of these changes by filing a public notice (albeit inadequate) specifically referring to the federal public notice regulation at issue in this case. 42 C.F.R. § 447.[4] Respondents are simply advancing a post-hoc litigation position when they assert that the interim and phase-in rates did not constitute a significant change from the earlier cost-based system requiring compliance with the state plan and public notice provisions of the federal Medicaid statute and regulations.

Finally, there is no basis for respondents to assert, as they do at pages 18-19 of their Brief In Opposition, that any issue with respect to the interim and phase-in rates is now moot, because they have been replaced by valid class rates at least

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[4] Repondents point out at page 18 n.7 of their Brief In Opposition that this public notice may also heve been required by statutes of the Commonwealth. Even if this is true, it does not change the fact that, in publishing the public notice, they specificially referred to the federal public notice regulation at issue in this case, thereby indicating their own conclusion that they needed to comply with the federal public notice regulation prior to implementing the interim and phase-in rates.

as of November 1, 1994. Once again, petitioners have been consistently asserting that respondents' implementation of the class rates as of November 1, 1994, was *not* valid and, as a result of the Court of Appeals undue reliance on the approval by HCFA's Regional Administrator of SPA No. 94-003 retroactive to January 1,1994, there has been no reasoned determination of this issue by an appellate court.

IV. THE PROVISIONS OF THE MEDICAID STATUTE AND REGULATIONS AT ISSUE IN THIS CASE ARE ENFORCEABLE IN AN ACTION UNDER 42 U.S.C. § 1983

Respondents assert as a final point that certiorari should be denied in this case because, regardless of the correctness of the Court of Appeals' decision, or its consistency with the decisions of other circuits, petitioners had no right of action under 42 U.S.C. § 1983 in the first place. Brief In Opposition, pp. 19-24. Both the District Court (A-33 to A-46) and the Court of Appeals (A-9 to A-16) rejected these contentions, and they provide no basis for denying certiorari in this case. See also *Arkansas Medical Society, Inc.* v. *Reynolds*, 6 F.3d 519 (8th Cir. 1993) (substantive provisions of Equal Access Provision and enforceable in action under 42 U.S.C. § 1983).

CONCLUSION

For all the foregoing reasons, and the reasons petitioners have previously stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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